

No. 11652

IN THE

United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

LEROY J. LEISHMAN,

Appellant,

vs.

RADIO CONDENSER COMPANY and GENERAL INSTRUMENT
CORPORATION,

Appellees.

RADIO CONDENSER COMPANY and GENERAL INSTRUMENT
CORPORATION,

Cross-Appellants,

vs.

LEROY J. LEISHMAN,

Cross-Appellee.

APPELLANT'S REPLY BRIEF
AND
BRIEF OF CROSS-APPELLEE

LEROY J. LEISHMAN,

2921 Greenfield Avenue, Los Angeles 34,

Defendant, in Propria Persona.

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APPELLANT'S REPLY BRIEF.

The Summary Judgment Should Be Set Aside.

The chief question raised by this appeal is whether the issues before the lower court should have been decided without a trial. The gross impropriety of the summary judgment was shown in Appellant's Opening Brief in the Introduction to the Argument on pages 10 and 11, and it was discussed at greater length in the same brief on pages 72 to 77. In reply, the Brief for Plaintiffs-

Appellees offers two short sentences and a single decision. The decision (pages 66 and 67) is to the effect that summary judgment is proper when there is "no genuine issue as to any material fact." The two sentences, which complete plaintiffs' consideration of this all important subject, are as follows: "No issue of fact requiring testimony was presented. Any issue of infringement is a question of law to be decided by the court."

The portion of plaintiffs' brief devoted to the propriety of the Summary Judgment makes no attempt to substantiate these generalities.

Shortly before judgment was entered in the present case, the U. S. District Court for the Western District of Oklahoma had declared after a full trial [R. Vol. I, p. 53 *et seq.*] that the claims here at issue are "clearly valid and clearly infringed" (finding 6) by the very tuners that are the subject of the present litigation. If the plaintiffs¹ here did not agree with that decision, then there was a genuine issue of fact to be decided.

"Infringement is a question of fact."

Stilz v. United States 269 U. S. 144, 147, 70 L. Ed. 202.

The issue of infringement in the present case resolved itself into a question of whether infringement can be avoided by substituting a plunger for the lever shown in the patent before the court. That the testimony of witnesses can have an important bearing upon this issue was shown by the testimony of Dr. Spotts, the expert witness against the patent in the Oklahoma trial, whose testimony

¹The Plaintiffs-Appellees and Cross-Appellants will hereinafter usually be referred to as *plaintiffs*, and the Appellant-Defendant and Cross-Appellee as the *defendant*.

was discussed on page 76 of Appellant's Opening Brief. In its two-sentence discussion of the propriety of the summary judgment, plaintiffs' brief is discreetly silent regarding the entire Oklahoma matter.²

The Oklahoma decision and the demonstration that it afforded of the importance of the testimony of witnesses, *are alone sufficient to show that the summary judgment should be set aside.*

Inasmuch as the opinion of the court below was based upon this Appellate Court's opinion in *Leishman v. Associated Wholesale Electric Co.*, 137 F. (2d) 722, the matter of whether the evidence was the same in the two cases became a second very pertinent issue of fact. This important issue was raised in the affidavit of Leishman [R. Vol. I, p. 46], filed on behalf of the defendant, and stating that most of the evidence here presented was not in the record of the previous case. If the averments of this affidavit were correct, the doctrine of *stare decisis* could not be followed in order to permit judgment in plaintiffs' favor. It thus became the plaintiffs' burden (1) to show that the new evidence was not genuine, or (2) that this evidence was before this Circuit Court of Appeals when it rendered the decision in the *Associated* case. The plaintiffs did neither of these in the two pages devoted to the propriety of the summary judgment, but in other portions of their brief they endeavor to give the impression that the evidence was not new. Plaintiffs thus deal with this second issue of fact despite their categorical statement that no issue of fact exists.

²Plaintiffs discuss the Oklahoma case only in connection with defendant's claim that the plaintiffs herein are bound by the Oklahoma judgment.

A third genuine issue of fact has to do with whether the plaintiffs here are bound by the judgment in the Oklahoma case. Inasmuch as that case was tried subsequent to the filing of defendant's answer herein [R. Vol. I, pp. 15-17], this new defense of estoppel required an amendment to the pleadings. This third issue was consequently raised in Defendant's Motion under Rule 15d for permission to file a supplemental answer [R. Vol. I, pp. 63-65] and in the affidavit in support thereof [R. Vol. I, pp. 69-72]. After this motion was denied a transcript of the Oklahoma trial became available, and the issue was then raised anew in connection with Defendant's Motion under Rule 52b [R. Vol. I, pp. 100-101], which was accompanied by a certified copy of the pertinent pages from the Oklahoma record [R. Vol. I, p. 103 *et seq.*].

This issue was discussed in Appellant's Opening Brief beginning on page 53, and plaintiffs' comments thereupon will be considered on pages 32 to 43 hereof.

If the evidence presented in connection with the motions under rules 15d and 52b was in any way insufficient, in the view of the lower court, to establish this third defense, the defendant should nevertheless have been permitted to supplement the pleadings, and he should have been given the opportunity to adduce more complete evidence at a trial.

Summary judgment was thus granted in spite of three genuine issues of fact.

**The Evidence Here Is Vastly Different From That
in the Associated Case.**

On page 34, the Brief for Plaintiffs-Appellees says: "The fact that both plungers and levers had been used in radio tuners in the prior art was shown by the record in the Associated Wholesale Elec. case and conceded by both parties in that case." Those fighting the patent in that case, represented as here by the law firm of Lyon and Lyon, *never made any such concession*, and there was not a single prior art tuner patent in the *Associated* record that showed a plunger for performing the function of a lever.

The only prior art introduced in the *Associated* case was contained in the then Defendant's Exhibit J, which was reproduced in Volume III of that record on pages 567 to 648. Exhibit J consisted of the following six patents:

Woodbridge, No. 585,996;
Schaefer, No. 1,906,106;
Cunningham, No. 1,930,192
Flaherty, No. 1,948,373;
Miller, No. 2,014,358;
Marschalk, No. 2,072,897.

Of these six, only the Shaefer, Flaherty and Marschalk patents were for automatic tuning devices, and the tappet member in each of these was mounted on a lever.

In that action, Leishman did not expect the defendant would seriously contend that the plunger of the accused device was not the equivalent of the lever shown in the

patent; and since claims 7 and 8 did not call for either, the matter of their equivalency did not seem particularly necessary to the issue of infringement. Hence the plaintiff (Leishman) did not introduce any patents showing the use of the plungers for transmitting motion from the operator's finger to the internal mechanism of the tuner. But when the defendant claimed on appeal that it did not infringe because it used a plunger, and that this was an innovation with Crosley, the plaintiff searched the record for something to show that Crosley did not introduce the plunger and that this element was old in the art. In its answer to the Bill of Complaint, the defendant had listed twenty allegedly pertinent prior art patents, but there was of course nothing to show which were tuner patents, nor which tuner patents, if any, were operated by plungers. The plaintiff (appellant Leishman) in that case reproduced the said list in Appellant's Supplemental Brief on the first page of the Appendix, and he made notations after five of the listed patents to the effect that they were plunger-operated; but since the patents themselves had not been introduced as evidence, there was nothing whatever in the record to verify these notations. The plaintiff there was able to find reference to plungers in the file wrapper of the Crosley patent application, and he found another reference in the published decision in the case of *Jacke v. Long*; *Jacke v. Goldsborough*, 111 F. (2d) 184. Since there were no plunger tuner patents in the record to refute the claim that such tuners were a Crosley innovation, the plaintiff had to be content with these mere allusions to such devices in the Crosley file

wrapper and in the *Jacke* decision, and they were accordingly quoted on page 16 of the then Appellant's Reply Brief.³ The present plaintiffs on page 34 of their brief now refer to this portion of the *Appellant's* Reply Brief in the *Associated* case as proof of their statement that it was conceded by *both* sides in that action that plungers and levers were old in the automatic tuning art. Such a concession by the defendant in that case would have run counter to the said defendant's claim that plunger tuning

³The complete reference to these sources was as follows:

"Appellee's statement that the plunger operating means of the accused devise is responsible for the wide acceptance of automatic tuning, is at variance with the record.

"These statements are not made in good faith, because appellee's counsel Gibson Yungblut admittedly prepared and prosecuted the Crosley patent application on the accused tuner [II, p. 476] and knows that the claims he wrote on the plunger feature were all rejected because plungers were used in the Bast, Faas and Marvin tuners, patented in 1928, 1933 and 1929, respectively. These patents were cited by the Examiner in the Office Action that appears on pages 20 and 21 of the Crosley file wrapper [appellant's physical exhibit 21]: In addition to citing these three patents, the Examiner said:

'Claims 15 and 16 are rejected as unpatentable over Marvin. As broadly expressed in these claims, the members 34 of Marvin may be considered to be plungers and the adjustable means thereon the members 35 and 36.

'All claims are rejected.'

"However, plungers for automatic tuners go back even further than these patents, the decision in the case of *Jacke v. Long*; *Jacke v. Goldsborough*, 111 F. (2d) 184, stating on page 186:

"Subsequently while in California Jacke proceeded to electrify his mechanical unit of 1922. This necessitated the lengthening of the *push button rods*, . . ."

was introduced by Crosley;⁴ and had such a concession been made it obviously would have been pointless for the plaintiff there to have ferreted out such meager references as those in the Crosley file wrapper and the *Jacke* decision in an attempt to verify his statement that plunger tuning was old.

It will be noted that the allusions to the prior art use of plungers in the Crosley file wrapper and in the *Jacke* decision (quoted in footnote 3 on page 7 hereof) gave no indication as to whether such plungers were used for the operating members. With no other evidence in the *Associated* case regarding the use of plungers in the tuners of the prior art, this Honorable Court had no proof that plungers and levers had been used as mechanical

⁴The Court may take judicial notice of the following excerpts from the Brief for Appellee in the *Associated* case:

"The patent is not entitled to be broadly construed so as to include within its scope the accused devices, which are not operated by levers *but by the plunger control developed by the Crosley Corporation.*" (p. 8.) (Emphasis added.)

"The record is clear that the short period of time spent by the Crosley Corporation in developing the devices complained of herein was directed to the designing of the *push button or plunger type of device.*" (p. 31.) Emphasis by the defendant-appellee in the *Associated* case.

Appellant Leishman's Supplemental Brief in the *Associated* case made the statement that "plunger tuners *per se* were already 15 years old," the reference being to the three-line quotation from the *Jacke* decision repeated in footnote 3 on page 7 of the present brief alluding to *push button rods* in a 1922 tuner. If *both* sides in the *Associated* case conceded that plunger tuners were old, as the Brief for Plaintiffs-Appellees now tries to tell the Court, the appellee there would have conceded that "plunger tuners *per se* were already 15 years old." Instead, however, Appellees' Reply to Appellant's Supplemental Brief (typewritten) stated on page 34: "There is no justification in the record for Appellant's Supplemental Brief statement (p. 9) that 'plunger tuners *per se* were already 15 years old.' Reference in Appellant's Reply Brief herein (p. 16) is to the opinion of the Court of Customs and Patent Appeals in the case of *Jacke v. Long*, 111 F. (2d) 184. The facts asserted in such opinion are not before this Court on the record herein."

equivalents for operating automatic tuners before the patent at issue was granted.

In the present case, the evidence is vastly different. Ten prior art patents have been introduced, all showing the use of plungers for operating automatic tuners or other devices in which control-shafts must be rotated to predetermined angular positions. *None of these patents was in the record of the Associated case.* The plaintiffs, however, in their anxiety to make it appear that the evidence here is not new, make the bald statement on page 29 of their Brief for Plaintiff-Appellees that "Six of these ten patents offered in evidence in this case were before the court in the *Associated Wholesale Elec.* case [Tr. of Rec. Associated Case, Vol. III, Defts. Exh. J, pp. 567-648; Cf. Defts. Ex. D, p. 566]." That this statement is not true can easily be verified by examining the said Exhibit J, in Vol. III of the *Associated* record, where it will be found that *none* of the ten patents here introduced [R. Vol. II pp. 177 to 255] can be found among the six in the *Associated* case.

In addition to the ten plunger patents here introduced to show that plungers were well known in the prior art for operating tuners and other shaft-positioning devices, the defendant has placed in the record 16 sets of photographs [Deft. Physical Ex. 1a to 16b], all showing the alternative use of levers and plungers for operating well known mechanisms.

The evidence in this case is thus manifestly different from that in the *Associated* case, and the former decision is consequently not *stare decisis* on the matter of levers and plungers.

Summary judgment should therefore not have been rendered on the basis that this Court's decision in the *Associated* case could be followed *in toto* here.

Re: Plaintiffs' Arguments to the Effect That the Former Decision Should Nevertheless Be Followed.

Appellant's Opening Brief, pages 32 to 34, set forth the law with respect to mechanical equivalents. The brief then established that plungers were well known as equivalents for levers in the automatic tuning art when the patent at issue was granted (pp. 34 to 44 incl.) and showed that three of the ten cited patents even illustrated the alternative use of plungers and levers for rotating shafts to predetermined positions. These three patents were issued respectively to:

Kettell (see the insert between pages 36 and 37 of Appellant's Opening Brief);

Peck (see page 39 of said brief); and

N. V. Philip's Glowlamp Factory (see the chart of this Danish patent on the insert between pages 42 and 43 of Appellant's Opening Brief).

Even though defendant has established that plungers and levers are equivalents in the combinations involved in this suit, the plaintiffs advance two different arguments in support of their contention that the *Associated* decision should be followed in this action. The first of these is based upon a misinterpretation of the *Associated* decision, and the second upon a misconstruction of the rules regarding infringement.

These arguments of the plaintiffs will be considered in that order.

On pages 32 and 33 of their Brief for Plaintiffs-Appellees, the plaintiffs misinterpret this court's opinion in the *Associated* case in an effort to make it appear that the court construed the invention as intended only for performing two tuning operations simultaneously, rather

than for tuning either a radio set, or a television set, or both. On page 32 of their brief, the plaintiffs say:

“* * * The opinion refers to the patent’s statement of the purposes of the alleged invention as illustrative of the fact that two shafts *must* be controlled and operated simultaneously,—not that they must necessarily be radio receiving apparatus and television apparatus shafts . . .” (Defendant’s emphasis.)

This Court never made any statement or inference that two shafts *must* be operated simultaneously. Such a statement or inference would have been directly contradictory to the plain language of the patent itself. Right in the second paragraph of the patent it is stated that one of the objects of the invention is:

“to make it possible for a single manual operation to tune *either* a radio set or a television set, or both.” (Emphasis added.) [R. Vol. II, p. 169, column 1, lines 28 to 30].

After trying in previously quoted portions of their brief to make it appear that the invention was concerned only with a double tuning operation, the stated objects to the contrary notwithstanding, the plaintiffs say:

“This Court points out that the rocker 54, tappet 62 and levers F and 66 are mechanical elements necessarily included as essential to Leishman’s combination’s performance of such simultaneous tuning.”

It is true the opinion mentioned that the rocker 54 and tappet 62, shown in the drawings, were not included in the Crosley tuner, and it commented that the function of moving a second tappet was not performed by the plunger in the Crosley mechanism, but it based the holding of non-infringement upon the court’s conclusion

(arrived at by the record in the case) that "The part so performed is not performed in the same way, or in substantially the same way. Hence the plungers and the levers are not equivalents."

Neither the objects set forth in the patent, nor the elements called for in the claims at issue, nor the well-known rules of claim interpretation will permit the construction which the plaintiffs are trying to read into this Court's opinion in the *Associated* case. In deciding the issue of infringement, each claim stands alone; and infringement of a given claim is determined by whether the accused device contains the elements set forth in that claim, or the equivalents of such elements, and it is never required that an infringing device include other elements shown in the patent but not included in the claims sued upon. The second rocker and the second tappet are obviously not needed unless the tuner is to be used for both radio and television, and these extra parts are not set forth as elements in any of the claims here at issue.

In concluding its efforts at importing additional elements into the claims, the Brief for Plaintiffs-Appellees says (p. 33):

"An error of appellant's argument is thus illuminated, to-wit: that the claimed combination consists of *three* elements and that 'two of the three elements in the Crosley tuner were held by this Honorable Court to be the equivalents of the corresponding elements in the reissue patent here in suit'." (Plaintiffs' emphasis.)

It is strange that counsel for the present plaintiffs made this same "error" when stating how many of the elements of the patent were involved in the *Associated* case. In the Brief for Appellee in that action, signed by

Leonard S. Lyon, the following paragraphs appeared on pages 11 and 12:

“In the drawing (Figure 1 of this brief)⁵ there appears a second cam⁶ or tappet H which is mounted upon the lever A and is shaped to contact another rocker mounted upon a shaft distinct from the shaft of the rocker C, which second shaft is intended to be the tuning shaft of a television receiving apparatus. *We are not concerned in this case with these additional elements of the Leishman apparatus.* (Defendant’s emphasis.)

“The device of the patent in suit, therefore, consists essentially of three elements: a *lever* adjustably mounting a *tappet* which is movable by the lever into contact with a *rocker* attached to the shaft to be positioned by a movement of the lever.” (Opposing counsels’ own emphasis to identify the said three elements.)

That we are concerned only with these three elements, and not with the second tappet and rocker, was also admitted in a moment of candor by opposing counsel *in the present case* on page 44 of their Brief for Plaintiffs-Appellees, as follows:

“The devices complained of herein are radio receivers only and have no associated television apparatus. We are concerned in this suit, therefore, *only with the portions of the mechanism of the patent in suit which are designed for tuning a radio receiver.*” (Defendant’s emphasis.)

⁵Figure 1 of the said brief was a reproduction of Fig. 2 of the patent, in which the appellee used the letter H to designate the second tappet.

⁶The term “cam” is one of several used for this member in the industry instead of “tappet”. See the footnote at the bottom of page 23 of Appellant’s Opening Brief.

Plaintiffs discuss the law with respect to infringement at considerable length. There appears, however, to be no possible pertinence to the part of this discussion beginning on page 28 of their brief and entitled "A Patent for a Combination Is Not Infringed by Using One Element of Such Combination as an Element of a Different Combination." Certainly no one has claimed in this case that infringement was present because of the use of *one* element of defendant's combination.

The decisions cited by the plaintiffs in their discussion of the doctrine of mechanical equivalents, when the terms are given their proper legal meaning, are all in full harmony with the Supreme Court decisions cited in Appellant's Opening Brief to show that the plungers of plaintiffs' tuners are the mechanical equivalents of the levers shown in defendant's patent, and that infringement has been established.

On pages 20 and 21 of their brief, the plaintiffs quote this Court's opinion in the case of *Magnavox Co. v. Hart & Reno*, 73 F. (2d) 433, at 444. The quoted portions of this decision deal with a situation in which an element of a claim is omitted and no substitute is provided. To quote plaintiffs' quotations—

"* * * A defendant who omits one of the material elements of the combination does not infringe.

* * * * *

"'If defendant omits one or more of the material elements which make up the combination, he no longer uses the combination; and it is no answer to say that the omitted elements are not essential, and that the combination operates as well without as with them.'"

When a mechanical equivalent is substituted for the omitted element, however, the law does not recognize that the element has been omitted. In other words, a mechanical equivalent is considered legally to be the same element. In "Patents," a text-book compilation of the patent decisions of the Supreme Court, written by Bierne Stedman, LL.B., copyrighted in 1939 and published by The Michie Co., Charlottesville, Virginia, the settled law on this point is summarized as follows (Sec. 194, p. 479):

"* * * the rule that the use of less than all of the elements of a combination does not constitute infringement *is subject to the qualification that they must not be used in connection with a known equivalent for the omitted element.*" (Emphasis added.)

The plaintiffs make much of this Court's statement in the *Associated* decision regarding the function of the plunger, where the Court said: "The part so performed is not performed in the same way, or in substantially the same way. Hence the plungers and the levers are not equivalents." *Known* substitutes are considered to perform their function in the same way, or substantially the same way. The Court's judgment as to whether two things perform their function in the same way, or in substantially the same way, must therefore depend upon the evidence as to the known substitutes. This rule is well illumined by the plaintiffs' quotation from the Supreme Court case of *Electric R. R. Signal Co. v. Hall Ry. Signal Co.*, 114 U. S. 87, quoted as follows on pages 17 and 18 of their brief:

"* * * To constitute identify of invention, and therefore infringement, not only must the result attained be the same, but in case the means used for its attainment is a combination of known elements, the elements combined in both cases must be the

same, and combined in the same way, so that each element shall perform the same function, *provided, however, that the differences alleged are not merely colorable*, ACCORDING TO THE RULE FORBIDDING THE USE OF KNOWN EQUIVALENTS!" (Defendant's emphasis.)

The rule forbidding the use of known equivalents was thoroughly discussed in Appellant's Opening Brief on pages 32, 33 and 34, where the controlling Supreme Court decisions were quoted.

What constitutes an equivalent is also defined in another case quoted by the plaintiffs. In the quotation from *Dey Time Register Co. v. Syracuse Time Recorder Co.*, 152 Fed. 440, at 450, the following appears at the center of page 19 of plaintiffs' brief:

"* * * The substitution of an equivalent is, however, a mere change of parts and form involving no inventive skill, but suggested by the invention itself to every person skilled in the particular art'."

The things suggested by the invention to every person skilled in the particular art are obviously the *known equivalents*.

These decisions thus merely reiterate the rule established in the Supreme Court case of *Seymour v. Osborne*, 11 Wall. (78 U. S.) 516, at 556, 20 L. Ed. 33 at 42, where the Court said:

"* * * Mere formal alterations in a combination in letters patent, however, are no defence to the charge of infringement, and the withdrawal of one ingredient from the same and the substitution of another which was well known at the date of the patent as a proper substitute for the one withdrawn, *is a mere formal alteration of the combination if the ingredient substituted performs substantially the*

same function as the one withdrawn." (Emphasis added.)

Appellant's Opening Brief, on pages 34 to 43 inclusive, showed that plungers and levers have long been known as full equivalents for operating various mechanisms and even for the specific purpose of moving tappets.

The plaintiffs now try to beg the question by saying that the *other* elements of the prior art devices were not like those in defendant's combination. For example, in discussing the 1883 Kettell patent showing the alternative use of levers and plungers for moving tappets, plaintiffs' brief says on page 38:

"No rocker-tappet-lever combination is shown, nor is a rocker-tappet-plunger combination shown. The members which Leishman calls tappets are but projections of the members which he refers to as plungers and levers. These projections are integral with the so-called plungers and levers and are not, as in the patented combination, pivotally adjustable with respect to the Kettell plunger and lever."

There is certainly no requirement in law that an element, in order to be a mechanical equivalent of an element in a patented combination, must be found in the prior art in association with precisely the same elements that form the remainder of the combination. In order to meet the test which the plaintiffs would apparently have the Court follow, defendant would first have to prove that his combination had been anticipated before he could establish that it had been infringed.

That levers and plungers were used as full equivalents in Peck's prior art tuner, is admitted on page 38 of plaintiffs' brief, as follows:

"* * * *When the lever is depressed or when the plunger is moved, the links are extended to their*

furthest positions to move the disc to a predetermined position.” (Defendant’s emphasis.)

As with the Kettell patent, plaintiffs irrelevently complain (page 39) that the members mounted upon the levers and plungers in the Danish Patent No. 52,047 are different from defendant’s tappets, *but the alternative use of the plunger and lever is admitted*:

“* * * Figure 1 of the patent shows a plunger having a fixed cam follower roller on its end which coacts with a cam mounted on the shaft to be positioned. Figure 2 shows a similar cam follower mounted on a lever.”

The equivalency of a plunger and lever in defendant’s combination may be further shown by the test set forth on page 22 of the Brief for Plaintiffs-Appellees in the quotation from Deller’s Walker on Patents, Vol. 3, Section 468, pages 1706-1707, as follows:

“* * * In a purely scientific sense, a screw always performs its function in a substantially different way from a lever, and in substantially the same way as a wedge. Screws and wedges are equally inclined planes, while a lever is an entirely different elementary power. But screws and levers can practically be substituted for each other in a larger number of machines than screws and wedges can be similarly substituted. *When a lever and a screw can be interchanged and still perform the same function with a result that is beneficially the same, they are said to perform the same function in substantially the same way.*” (Defendant’s emphasis.)

It is hardly necessary to point out that there is a far greater similarity between the action of a plunger and the action of a lever than there is between the actions of

a screw and a lever, yet the foregoing quotation holds that a screw and a lever are equivalents if they perform the same function. This quotation also shows that elements that are different in a purely scientific sense, but which nevertheless perform the same function, are said *to perform the same function in substantially the same way*. According to this rule, plaintiffs' plungers and the lever shown in the patent are thus mechanical equivalents and perform their function *in substantially the same way*.

Walker on Patents is also helpful in the quotation at the middle of page 22 of the Brief for Plaintiffs-Appellees:

“ ‘But one thing may be an equivalent of another in one environment, and not such an equivalent in another situation. * * * Springs and weights are generally equivalents * * *, but where the environment is such that a spring will operate successfully while a weight will not so operate, there they are not equivalents. * * * ’ ”

Certainly the plaintiffs cannot claim that their plunger does not work equally as well as the lever in the combination with which we are concerned.

The plunger of the accused devices and the lever shown in the patent have now been shown to be mechanical equivalents even according to the criteria set forth in the decisions in plaintiffs' own brief. All these decisions, in one way or another, expound the same doctrine long ago established by the Supreme Court, but none of them express the rule more simply than it is expressed in the leading Supreme Court cases cited on pages 32 and 33 of Appellant's Opening Brief. Let us therefore repeat

the rule in the lucid words of those Supreme Court decisions:

“* * * Mere formal alterations in a combination in letters patent, however, are no defence to the charge of infringement, and the withdrawal of one ingredient from the same and the substitution of another which was well known at the date of the patent as a proper substitute for the one withdrawn, *is a mere formal alteration of the combination if the ingredient substituted performs substantially the same function as the one withdrawn.*”

Seymour v. Osborne, supra.

“Patentees of an invention consisting merely of a combination of old ingredients are entitled to equivalents, by which is meant that the patent in respect to each of the respective ingredients comprising the invention covers every other ingredient which, in the same arrangements of the parts, will perform the same function, *if it was well known as a proper substitute for the one described in the specification at the date of the patent.*”

Imhaeuser v. Buerk, 101 U. S. 647, 656, 25 L. Ed. 945.

In “Patents,” quoted on pages 33 and 34 of Appellant’s Opening Brief, Stedman reviews the Supreme Court decisions down to 1939, and he states the settled law on this point in the following words (Sec. 194, p. 479):

“* * * By an equivalent in such a case it is meant that the ingredient substituted for the one withdrawn performs the same function as the other, and that it was well known at the date of the patent securing the invention as a proper substitute for the one omitted in the patented combination.”

As pointed out on pages 17 and 18 hereof, the plaintiffs admit that plungers and levers were used as equivalents in the prior-art shaft-positioning devices of Kettell, Peck, and Philip's Glowlamp Factory, the last two of which were even automatic tuners. In using a plunger in their tuners instead of the lever shown in the patent, the plaintiffs have thus merely substituted a well-known mechanical equivalent.

The other two elements called for in the claims are the rocker and the adjustable positioning member, or tappet. The plaintiffs do not deny that these elements are present in their tuners, which they contend are the same insofar as this patent is concerned as the Crosley tuner involved in the *Associated Wholesale* Case.⁷ This Court's holding that the rocker and tappet of the Crosley tuner are the equivalents of the corresponding elements of the patent, is not opposed by the plaintiffs, and the said ruling therefore applies with equal force to the rocker and tappet of the accused tuners in the instant action.

The incontestable proof now presented as to the equivalency of the plunger and lever, thus complete the proof of infringement.

Manifestly, the lower Court's summary judgment of non-infringement was arrived at by following this Appellate Court's holding with respect to the plungers and levers in the *Associated* case without regard for the fact that it is clearly not applicable here because of the nature of the new evidence. The judgment of the lower Court should accordingly be reversed.

⁷See reference on page 12 of Appellant's Opening Brief to Mac-keown affidavit submitted on behalf of the plaintiffs.

A Former Decision Is Not Stare Decisis Where the Evidence Is Different.

The Brief for Plaintiffs-Appellees discusses this subject under the heading, "The Legal Effect of This Court's Adjudication of Re-20,827."

Plaintiffs say that appellant misconceives the law on this subject, yet *all four* of the decisions cited by the plaintiffs support the position of the defendant and not that of the plaintiffs.

In the quotation from *Badische Anilin & Soda Fabrik v. A. Klipstein & Co.*, 125 Fed. 543, 545-6, appearing on pages 24 and 25 of plaintiffs' brief, the court says:

"* * * The rule is well settled that, when a patent has once been sustained by an appellate court, a subordinate court, dealing with the same patent subsequently, inquires first whether the second record contains anything not before the appellate court (whether mentioned in its opinion or not), and, if it finds something new, inquires next whether the new matter is of such a character that it may fairly be supposed that the appellate court would have reached a different conclusion, had it been advised of its existence."

It has been fully demonstrated in this brief and the opening brief that the present record contains a great deal that was not before the appellate court, and that the new matter is of such a character that this court, had it been advised of its existence, would have reached the conclusion that plungers were well known in the art as substitutes for levers for operating tuners and other shaft-positioning devices when the patent at issue was granted, and that these elements are therefore mechanical equivalents.

Plaintiffs next quote from *Crier v. Innes*, 170 Fed. 324, 325 (C. C. A. 2). Plaintiffs' quotation includes the following:

“* * * when a patent, after full hearing, has been declared by the Circuit Court to be valid and such decree has been affirmed by this court, we should follow the decision in a subsequent case involving the validity of the same patent, *and not presenting any essentially different evidence*, notwithstanding the claim of invalidity was not urged upon this court upon the prior appeal.” (Defendant's emphasis.)

This decision merely recommends following the former decision when the new record does not present any essentially different evidence. When the evidence *is* essentially different, as in the instant case, the former decision should clearly not be followed.

The third decision quoted by the plaintiffs was rendered in the case of *Concrete Mixing, etc. Co. v. Powers-Kennedy Contracting Corp.*, 27 F. (2d) 668, 669, 670, in which the court said:

“But whatever the court as now constituted might think of the correctness of our former ruling, it is our duty to follow it, *unless new evidence raises questions of the patent's validity not previously considered*.” (Defendant's emphasis.)

In the instant case, ten patents and Defendant's Physical Exhibits 1a to 16b show that plungers and levers were well known equivalents for operating tuners and other devices when the patent at issue was granted, and none of this evidence was previously considered.

The fourth and last case quoted by the plaintiffs on the extent to which a previous decision is controlling, is the case of *Cortelyou v. Charles E. Johnson & Co.*, 145 Fed.

933, 934. In referring to a previous decision, the court there said:

“* * * It is a clear, comprehensive and convincing exposition of the law as applicable to the facts as stated in the bill and admitted by the demurrer, *and, upon similar facts, is as controlling upon us as if it were originally promulgated by this court.*” (Defendant’s emphasis.)

This Court’s decision on the matter of the equivalency of the rocker and the tappet to the corresponding elements of the patent in the *Associated* case, is therefore controlling here; but upon the matter of the levers and plungers, *where the facts presented in the evidence are vastly dissimilar*, the truth as revealed in the new evidence must be recognized.

Regarding Plaintiffs’ Discussions of Coaxiality.

The Brief for Plaintiffs-Appellees devotes thirteen pages (40 to 53) to a discussion of “Coaxiality” and five more pages (53 to 58) to a topic entitled “The Crosley Method of Securing Coaxiality Is Not Equivalent to That of the Reissue Patent in Suit.” Most of this is entirely irrelevant to the issues before the court, and a large part of the discussion pertains to matters upon which neither side could present any evidence in a summary judgment proceeding.

The word *coaxiality* is nowhere mentioned in the patent, but claims 8, 10 and 11, specify that the axis of the tappet must be substantially *coaxial* with the axis of the rocker when these members are in the completely engaged position. Claims 7 and 9 recite structural features that are necessary in order to attain this coaxial relationship.

The plaintiffs nowhere contend that their rockers and tappets do not meet the requirements set forth in the respective claims, and no fault has been found with this Court's ruling that the rockers and tappets in the patentwise identical Crosley tuners were the equivalents of the corresponding elements shown in the patent. Plaintiffs accordingly do not deny that their coaxial rockers and tappets are the equivalents of the corresponding coaxial elements of the claims.

The long discussion of coaxiality in the Brief for Plaintiffs-Appellees is thus quite irrelevant to the issue of infringement—the only issue that was decided upon plaintiffs' Motion for Summary Judgment. Plaintiffs variously contend that no invention was involved in arriving at the coaxial structure, that the coaxial relationship was an afterthought when the reissue was obtained, and that the Crosley method of obtaining coaxiality is not equivalent to that of the reissue patent. The Lyon and Lyon briefs raised all these arguments pertaining to coaxiality in the *Associated* case in an attempt to differentiate the accused coaxial combination from the coaxial combination of the patent and to supply some basis for the lower court's opinion that the patent was invalid for want of invention. This appellate court considered all these arguments and then (a) ruled that the Crosley tappet and rocker (which were coaxial in the tuned-in position) were equivalents of Leishman's corresponding elements, and (b) struck out the portion of the lower court's decision which said that the patent was invalid for want of invention.

Even if the issues raised by plaintiffs' revived coaxiality arguments were before this Court, there still could be no departure in this appeal from this Court's former ruling respecting the coaxial rockers and tappets nor from

its deletion of the lower court's holding of invalidity, because no new evidence whatever has been presented in this action on any of these points.

In case the Court might find some pertinence not apparent to the defendant in plaintiffs' coaxiality arguments, they will now be briefly discussed.

On page 18 of Appellant's Opening Brief, the patent's disclosures of the coaxial relationship are mentioned in connection with the patent drawings reproduced on page 15 of the said brief. At the bottom of page 18, this statement appears:

“* * * When this relationship does not prevail, peculiar difficulties are encountered when trying to adjust the loosened tappet to the proper angular position required for a given station; but when these parts have the coaxial relationship called for in the patent, no difficulties are encountered.”

A consideration of the issue of validity and of the difficulties encountered in the prior art, would have shown that this greater ease of adjustment contributes greatly to accuracy; but since the matter of validity was not involved in the summary judgment, and no evidence was presented with respect thereto, the subject of accuracy was not even discussed in Appellant's Opening Brief. Yet the Brief for Plaintiffs-Appellees says on page 49: “Appellant's brief makes many confusing statements concerning the necessity that a radio tuner be accurate and contains many references to automatic frequency control circuits.” The term “automatic frequency control” does not even appear in Appellant's Opening Brief, nor are these circuits discussed under any other name or in any way whatever.

A trial might bring out something on these subjects for the plaintiffs to talk about, but defendant has been shut off without a trial.⁸

On page 45 of their briefs, plaintiffs say, "Coaxiality was an afterthought with Leishman." An examination of the *original* patent [R. Vol. II, p. 174 *et seq.*] will reveal that plaintiffs' statement is not true. The coaxial relationship is shown in the drawings in Fig. 2, page 174,

⁸After a full trial at which the claims here at issue were held to be clearly valid and clearly infringed by the very tuners now before this Appellate Court, the U. S. District Court for the Western District of Oklahoma made the following findings with respect to "coaxiality" and *automatic frequency control circuits* [R. Vol. I, pp. 55, 57, 58 and 59] :

"13. The coaxial relationship between the axis of the tappet, or adjustable means, and the axis of the rocker is for the purpose of preventing any rotation whatever of the adjusted tappet and rocker during the adjusting process. Coaxiality has been used in the past for the opposite purpose of permitting parts to move freely and without binding."

"21. In the summer of 1937, the radio industry was using to a great extent automatic tuners referred to as motor driven tuners and telephone dial tuners. These were so inaccurate mechanically that they required expensive automatic frequency control circuits to make them at all acceptable to the trade. These tuners are shown in the June, July and August, 1937, issues of Radio Retailing.

"25. Early in the year 1938, radio set manufacturers and radio parts manufacturers began to use radio tuners embodying the invention covered by claims 7, 8, 9, 10 and 11 of the re-issue patent in suit. Tuners of this kind were supplied to the public in approximately 8,000,000 radio sets up to April, 1942. These tuners were sufficiently accurate mechanically to operate satisfactorily without the need of automatic frequency control circuits, and were easy to adjust to different broadcasting stations. The popularity of the motor driven and telephone dial tuners declined after 1938, and are now virtually obsolete."

and described in the specification on page 176, column 1, lines 30 to 34, in the following words:

“When the lever assembly is all the way down, it will be observed from Fig. 2 that the pin 60” (on which the tappet is mounted) “is substantially co-axial with the rockers 48 and 54, which means that in this position it is also co-axial with shafts S, 49 and 25, shown in Fig. 1.”

Plaintiffs’ argument that “The Crosley Method of Securing Coaxiality Is Not Equivalent to That of the Re-issue Patent in Suit” may be summarized in plaintiffs’ own words on page 54 of their brief:

“* * * The Crosley method of securing coaxiality is not the method of Leishman. Leishman secured alignment in the horizontal direction by causing the pivot point of his cam or tappet on the lever and the pivot points of his rocker to lie an equal distance from the pivot Q of the lever. . . . But Crosley, in securing horizontal alignment, passed a reciprocating plunger completely through the rocker and provided a side bearing on both sides of the rocker.”

This argument, it will be observed, has to do with how the parts are laid out in the drafting room. This patent is not on a method of mechanical drawing. Claims 8, 10 and 11 specify that the axis of the tappet and the axis of the rocker must be coaxial, and claims 7 and 9 recite physical structure associated with this relationship. The method of layout or the method of manufacture are irrelevant. It obviously makes no difference to these claims how the tuner “got that way”; it is the finished structure that counts.

Even as a matter of layout, the plaintiffs have put the cart before the horse. When it is known that the rocker and tappet must be coaxial, they are laid out that way in the first place. This is true regardless of whether the tappet is to be placed on a lever or a plunger. If the tappet or cam is to be placed on a lever, the lever is next drawn in; and then, no matter how long the lever may be, or where its pivot is placed, the tappet and rocker will be coaxial. If the tappet is to be mounted on a plunger, the plunger is drawn in after the tappet and rocker have first been laid out in the coaxial relationship. The guides for the tappet are then drawn in engagement with the plunger.

The fact that a plunger has guides or side bearings while a lever has a pivot, involves nothing whatever that was not well known in the prior art. In Kettell's 1883 device (see the insert between pages 36 and 37 of Appellant's Opening Brief), his plunger is shown with guides *b* and *b*; and his lever *E*, like every other lever, is provided with a pivot.

The matter of whether the tappet is mounted on a plunger having guides, or on a lever having a pivot, does not in any way affect the coaxiality of the tappet with respect to the rocker. Although Crosley's tappet was mounted on a plunger while the tappet in the patent was shown on a lever, this Court nevertheless held that the Crosley tappet and rocker (which were coaxial in the engaged position) were equivalents of the corresponding coaxial elements in the patent.

Regarding Plaintiffs' Discussion of Defendant's Interpretation of Claims 7 to 11.

On pages 59 to 65 of their brief, the plaintiffs object to the fact that the defendant does not interpret his claims as limited only to tuners operated by levers.

As repeatedly pointed out, none of the claims at issue call for a lever.

Claims 7 and 8 do not even mention an operating member of any kind, these claims being confined to the tappet and rocker. The type of member that carries the tappet is thus clearly immaterial to claims 7 and 8.

Claims 9, 10 and 11 call for "a manually movable operating member," or "manually movable operating means". It has been thoroughly established in these briefs that it was well known in the art that this could be either a lever or a plunger.

The fact that the plunger and lever were well known substitutes, requires that both patents, the original as well as the reissue, be construed as if the use of the plunger "were written out in the patent and delineated in the drawings."⁹ The well-established doctrine on this point was thoroughly discussed on pages 45 and 46 of Appellant's Opening Brief. It is significant that this was entirely ignored in the Brief for Plaintiffs-Appellees.¹⁰

⁹*Carnegie Steel Co. v. Cambria Iron Co.*, 185 U. S. 403, at 437, quoted on page 45 of Appellant's Opening Brief.

¹⁰Plaintiffs also ignored pages 24 to 30 of Appellant's Opening Brief which discussed the subject, "The Stated Objects as Well as Original Claim 5 Described the Invention Without Reference to Levers." The plaintiffs thus do not dispute that claim 5 of the original patent should have been taken into consideration when determining the patentee's original intention to claim his combination without reference to levers. Although a ruling is not necessary on this point, in view of the present proof that plungers and levers are mechanical equivalents, the defendant nevertheless urges that this Court, for the benefit of other patentees, should clarify this important point of patent law in conformity with pages 24 to 30 of Appellant's Opening Brief. The fact that defendant's arguments are nowhere disputed by the plaintiffs, adds great force to what the defendant had to say.

**Appellees' Course Requires That the Claims at Issue
Be Held Valid as Applied to Them.**

This subject was discussed on pages 66 to 69 of Appellant's Opening Brief. The plaintiffs have not even attempted to refute the proposition, as there set forth, that the claims at issue are valid as applied to them. This Court should consequently so hold.

**The District Court Erred in Sustaining Plaintiffs'
Objection to Defendant's Interrogatories.**

On pages 69 to 71, Appellant's Opening Brief showed that the lower court was wrong in sustaining plaintiffs' objections to Defendant's Interrogatories 4, 5, 6, 7, 9, 10, 11, 17 and 18, and stated that if the issue of validity was to be tried, the lower court should be instructed to compel the plaintiffs to answer the said interrogatories because of the pertinence of the requested information to the issue of validity.

After identifying these interrogatories, the Brief for Plaintiffs-Appellees merely says on page 72:

“* * * This information could be material only on the issue of damages under appellant's counterclaim, paragraph II (I-16), and could not affect the summary judgment that there was no infringement.”

Defendant never claimed that this information was relevant to the issue of *infringement*, and he urged this court to require the answers only in case the issue of *validity* was to be tried. Appellant's Opening Brief showed that this information was highly relevant to the issue of validity, which the plaintiffs do not attempt to refute.

The Plaintiffs Are Bound by the Oklahoma Decision.

In Appellant's Opening Brief (pp. 53 to 65) it was shown that plaintiffs aided and participated in the defense of the Oklahoma action, and that they should therefore be adjudged bound by the Oklahoma decision.

Plaintiffs' brief, in discussing this subject (pp. 68 to 72), says the defendant urges that the Oklahoma decision is also pertinent from the standpoint of comity. As to the force of this decision, the plaintiffs say:

“* * * There is nothing in the record herein from which this Court can infer that the Oklahoma District Court even had before it this Court's *Associated Case* opinion. No reference thereto is made in the Oklahoma District Court's findings or conclusions. (I-52-60.)”

Contrary to this statement of the plaintiffs, the Oklahoma District Court made this finding [R. Vol. I, p. 59]:

“27. The tuners referred to in Finding 26¹¹ do not differ in any essential respect, so far as the question of infringement is concerned, from the tuner manufactured by Crosley Corporation of Cincinnati, Ohio, and which was the accused device in the action entitled *LeRoy J. Leishman v. Associated Wholesale Electric Co.*, tried in the Southern District of California and reported in 36 F. Supp. 804. In said

¹¹Finding 26 read as follows [R. Vol. I, p. 59]:

“26. The infringing tuners sold by defendant are exemplified generally by the defendant's exhibits G and H. These infringing devices were manufactured respectively by Radio Condenser Company and General Instrument Corporation, which are the joint plaintiffs in an action now pending in the District Court of the United States, Southern District of California, Central Division, and entitled: *Radio Condenser Company and General Instrument Corporation v. LeRoy J. Leishman*, No. 4395 B. H.”

action, the Circuit Court of Appeals for the Ninth Circuit rendered its opinion, reported in 137 F. (2d) 722."

Immediately following the last quoted words from the Brief for Plaintiffs-Appellees, the brief says that the Oklahoma court "does not even adjudge *Re. 20,827* to be for the same invention as the original patent." Here, again, plaintiffs' brief is in error. The U. S. District Court for the Western District of Oklahoma made two findings regarding the reissue and the matter of whether or not it was for the same invention as the original patent. These were findings 7 and 8, which read as follows [R. Vol. I, p. 54]:

"7. The reissue patent No. 20,827, and especially claims 7, 8, 9, 10 and 11 thereof, are for the same invention as patent 2,108,538; and it appears, from the face of the said patent 2,108,538, that plaintiff intended to claim the invention now claimed by claims 7, 8, 9, 10 and 11 in the reissue patent No. 20,827.

"8. The reissue patent No. 20,827 conforms in all respects with the requirements of Section 4916 of the Revised Statutes." (Section 4916 is the reissue statute.)

In conformity with these and other findings, the first conclusion of law read [R. Vol. I, p. 60]:

"1. Claims 7, 8, 9, 10 and 11 of the reissue patent No. 20,827 are good and valid in law."

And paragraph 2 of the Interlocutory Judgment was as follows [R. Vol. I, p. 61]:

"2. That claims 7, 8, 9, 10 and 11 of said reissue patent are good and valid in law."

Any criticism which the plaintiffs may have of the Oklahoma decision is of course irrelevant to the matter of

whether or not they are bound by that decision. If they aided and participated in the defense of that action they are bound by the decision, regardless of its nature.

Plaintiffs make no attempt to refute or deny the evidence presented by the defendant regarding the nature and extent of plaintiffs' participation in the Oklahoma action.

In Appellant's Opening Brief (pp. 53 to 65) the defendant showed from a certified copy of the Oklahoma record and the affidavit of Maxwell James, presented on behalf of the plaintiffs themselves, that:

1. Realizing their tuners would be accused as infringements of defendant's patent, the plaintiffs prepared a legal defense intended to make it appear that the patent claims were invalid as involving no invention over the prior art. (Appellant's Opening Brief, pp. 55, 56 and 57.)

2. In order to implement this legal defense, two special models were built by the model maker of plaintiff Radio Condenser Company.

3. One of these models was a representation of the Marschalk tuner. (See Appellant's Opening Brief, p. 55.)

4. The other model was intended to show "how the lever device of the Schaefer patent could be substituted for the lever device of the Marschalk patent, to *demonstrate* that there was no invention is so doing." (See quotation from James' affidavit on page 55 of Appellant's Opening Brief.)

5. On April 2, 1946, Mr. Mueller, who conducted the Oklahoma defense, telephoned Mr. James, the attorney in patent causes for both of the plaintiffs herein, stating that he, Mr. Mueller, was being compelled to go to trial in the Oklahoma suit on Monday, April 29th, and that

he, Mr. Mueller, did not have any or many physical exhibits to explain to the Court at such trial; and Mr. Mueller inquired whether Mr. James was in possession of any physical exhibits that he might lend to Mr. Mueller. (Appellant's Opening Brief, pp. 54 and 55.)

6. In response to Mr. Mueller's call for assistance, Mr. James delivered to Mr. Mueller the two models which were especially built to demonstrate the defense decided upon by the plaintiffs herein. (Appellant's Opening Brief, p. 55.)

7. In introducing the first of these models, Exhibit L in the Oklahoma action, Mr. Mueller identified himself with the plaintiffs herein, saying of this model: "*We* have no facilities for it, that is, that electric solenoid, so *we* have merely put a finger button on, and it can be operated by the hand in exactly the fashion that lever can." (Emphasis added.)

8. In introducing the second of the said models at the Oklahoma trial, Mr. Mueller said:

"For the purpose of this suit and an explanation of the defendant's position on invalidity, we have a model, Defendant's Exhibit M, which combines, as we will later show a lever out of the Marschalk patent, a lever out of the Schaefer patent, 1906106, and a rocker or rotary treadle out of the Marschalk patent, 20772897 [*sic*]." (Appellant's Opening Brief, p. 59.)

9. Mr. Mueller thus announced that he was going to present the legal defense which was embodied in the model prepared by the plaintiffs herein.

10. These models were the only models used at the trial that were constructed for defense purposes, all the

other models being regular commercial tuners available on the market. (Appellant's Opening Brief, pp. 58, 59 and 60.)

11. Mr. Mueller's sole witness against the patent was Dr. Spotts, associate professor of machine design at Northwestern University. Dr. Spotts' entire testimony was devoted to demonstrating the present plaintiffs' specially constructed models, laying a background for the same, and explaining the defense which the models were constructed to embody and demonstrate. (Appellant's Opening Brief, pp. 60 and 61.)

12. Mr. Mueller admitted that "If I had been doing it I would have had other models." (Appellant's Opening Brief, p. 62.)

13. The present plaintiffs thus were responsible for the defense presented at the said trial.

The plaintiffs deny none excepting the thirteenth item, but attempt to pass the others off by saying (Brief for Plaintiffs-Appellees, pp. 71 and 72): "The alleged 'participation' is shown to have consisted merely in lending to Mr. Mueller (attorney for defendant in the Oklahoma Case) two models, both of which had been in Mr. James' possession for years."

It must be borne in mind that these models had been in Mr. James' possession for years for the very purpose of defending the plaintiffs' tuners against a charge of infringing Leishman's patent when the need arose. It must also be borne in mind that the prior art had to be examined and a definite defense decided upon before models could be constructed to demonstrate such defense. In supplying these models to Mr. Mueller, at his request,

the present plaintiffs used the Oklahoma trial to present the defense which they had prepared in the hope of freeing their tuners from the charge of infringement.

The plaintiffs quote (page 70 of their brief) from the Ninth Circuit *Hy-Lo* case, which was also quoted in Appellant's Opening Brief (page 63), but plaintiffs' brief tries to make it appear that the defendant in the *Hy-Lo* case was freed, despite participation in the former action, merely because it was not a party thereto, whereas the controlling factor was the fact that the said defendant did not make the articles that were accused in the former suit.

The *Hy-Lo* case and the law governing when a party is bound were both well explained by this Court in the case of *National Nut Co. of California v. Sontag Chain Stores Co., Limited*, 107 F. (2d) 318, at 322, where the Court said:

“* * * The evidences establishes that the identical machine alleged to infringe was furnished to defendant by the Susu Nut Company, but this Company was never made a party to the actions, and there is no evidence that it participated in any phase thereof.

“This court in the case of *Hy-Lo Unit & Metal Products Co. v. Remote Control Mfg. Co.*, 9 Cir., 1936, 83 F. (2d) 345, 348-350, fully discussed the question as to when a person not formally made a party to an action may be estopped by the decision therein. We there said (page 350 of 83 F. (2d)

“ ‘These decisions by the Supreme Court establish the proposition that, in order for a person not formally made a party to a suit to be estopped by the decision therein, he must either be in privity with a party thereto in the strict sense of the term *or he*

must not only aid in the prosecution or defense of a suit, but have the right to participate and control such prosecution or defense. Neither in the supplemental bill or the affidavits are there any facts alleged showing a right of the appellee to participate in and conduct the defense of the action. * * *”

“Again, we quoted from our previous decision in *Carson Investment Co. v. Anaconda Copper Mining Co.*, 9 Cir., 26 F. (2d) 651, 657, as follows (pages 350 of 83 F. (2d)):

“‘We agree with appellee in the contention that the judgment could not be relied upon as an estoppel merely because the Anaconda Copper Company contributed some money toward the defense * * *; but that does not meet the broader proposition that if the Anaconda Company directed its counsel to confer with counsel for the American Smelting & Refining Company, and if such counsel participated in the preparation of the case for trial and in the trial of the issues, *and if the Anaconda Company had the right to exercise joint control over the litigation*, and did actually cooperate with the American Smelting & Refining Company in the trial and appellate courts * * * it became privy to the American Smelting & Refining Company suit.’ (All italics by the Court itself.)

“We think that the same rules apply to the converse situation, where it is sought to give one not a party to the action the benefits of the decision rendered therein. There is no evidence whatever to the effect that the Susu Nut Company actually controlled and directed the defense of the action before us, or that it had a right to do so.”

In the *Hy-Lo* case, the defendant participated in the defense of the former action, but was a stranger there-to because it did not make the devices involved in the

suit. In the *National Nut* case, the Susu Nut Company made the alleged infringing machine, but there was "no evidence that it participated in any phase thereof."

In the instant case, the plaintiffs state in paragraph 8 of the complaint itself that they made the devices alleged to infringe in the Oklahoma action [R. Vol. I, pp. 7 and 8], and their participation has been admitted by the plaintiffs' own counsel, Maxwell James, as well as by Foorman L. Mueller, counsel for the Oklahoma defendant. The plaintiffs expect, however, to escape the consequences of this participation on the ground that they nevertheless did not control the defense of the Oklahoma action, and that their preparation was made well in advance.

None of the decisions of this court is to the effect that full control is necessary in order to bind the third party. Such an interpretation would entirely nullify the rule that binds those who merely *aid* or *participate*. In this Court's decision in the *National Nut* case, *supra*, it quoted from its own opinion in the *Anaconda* case, supplying its own italics, as follows:

" . . . if the *Anaconda Company* had the right to exercise joint control over the litigation, and did actually cooperate with the American Smelting & Refining Company in the trial and appellate courts * * * it became privy to the American Smelting & Refining Company suit."

It is thus clear that if the third party *has the right* to exercise joint control, it is bound if it merely *cooperates* in the defense.

This Court has consistently recognized that a manufacturer has the right to exercise joint control over a suit brought against a different nominal party involving the

said manufacturer's product if the nominal party consents to, or invites, such action on the part of the manufacturer. These decisions do not go so far as to state that the manufacturer *must* exercise joint control. If his relation to the controversy is such that he *has the right* to exercise such joint control, he is then bound if he merely participates in the defense.

There is a direct parallel between the present case and the *Anaconda* case in that Mr. Mueller, counsel for the defendant in the Oklahoma action, conferred with Maxwell James, counsel for the plaintiffs herein, requesting his help.

Also, as in the *Anaconda* case, these plaintiffs certainly "participated in the preparation of the case for trial," to use the words of this court's first quotation from the *Anaconda* opinion. This court is well aware that those preparing patent cases for trial very commonly prepare charts so that the facts and the arguments may be more easily grasped. The plaintiffs here went even further and produced two working models to illustrate and demonstrate the defense, one of these models being described by plaintiffs' counsel, Maxwell James, as "a model showing how the lever device of the Schaefer patent could be substituted for the lever device of the Marschalk patent, to demonstrate that there was no invention in so doing." [James affidavit, R. Vol. I, pp. 67 and 68.] If "one picture is worth ten thousand words," one three-dimensional working model like this ought to be worth ten thousand charts.

In their preparation of a defense to free their tuners from the charge of infringement, the plaintiffs here did their job well. That is apparent from Mr. Mueller's own

words when introducing one of these specially constructed models:

“For the purpose of this suit and an explanation as illustrative of the defendant’s position on invalidity, we have a model, Defendant’s Exhibit M, which combines, as we will later show, a lever out of the Marschalk patent, a lever out of the Schaefer patent, 1906106, and a rocker or rotary treadle out of the Marschalk patent, 20772897 [*sic*].”

In his Second Affidavit in Support of Motion under Rule 15(d) [R. Vol. I, pp. 69 to 72] to which the Court is respectfully referred, Leishman sets forth several pertinent facts pertaining to the said model M. This affidavit included the following:

“7. That early in the trial of the said Oklahoma action, Mr. Mueller, counsel for the defendant there, stated that Dr. Spotts, who was then in Chicago, could be present at the trial only on Wednesday, May first, and that he, Mueller, therefore wanted permission to put Dr. Spotts on the witness stand on that day irrespective of whether or not the plaintiff had finished presenting his case; and that in order to secure such consent, Mr. Mueller exhibited the said model Exhibit M and stated that Dr. Spotts’ testimony would consist solely of an explanation of the Marschalk and Schaefer devices and of the model last above mentioned.

“8. That the said model Exhibit M was of such a nature that it was, and would be, perfectly obvious to anyone familiar with the Marschalk and Schaefer patents, how the said model was intended to be used at the trial—so much so, in fact, that Mr. John Flam and affiant were able, merely as a result of seeing the said model, to prepare Dr. Spotts’ cross-examination before he had even left Chicago.”

That Dr. Spotts *did* confine his testimony to this model and the Schaefer and Marschalk patents whose teachings were alleged to be combined therein, was demonstrated on pages 60 and 61 of Appellant's Opening Brief. The entire defense in the Oklahoma case was thus a mere presentation of what the present plaintiffs had prepared.

The plaintiffs say at the top of page 72 of their brief that "neither of these models was constructed for the Oklahoma case," and that they had both "been in Mr. James' possession for years." But the plaintiffs do not say that these models had ever been used in any other case, and they certainly do not deny that they were constructed for the special purpose of trying to show that defendant's structure could be arrived at without invention—in fact, the James affidavit set forth that this was the express purpose of one of them.

The claim that these models had been in Mr. James' possession for years, is evidently intended to mean that if his preparation for a trial involving the plaintiffs' tuners had not been started until a suit was filed, the plaintiffs might conceivably be bound; but if the plaintiffs used foresight and prepared for a trial well in advance, they could turn the results of their preparation over to the customer and avoid being bound by the judgment in the event that the customer lost. Does this make sense?

Even though there has not been a trial in the present case, these briefs have shown that enough documentary evidence was presented in support of defendant's Motion under Rule 15d [R. Vol. I, pp. 63-65] to sustain the defense that the plaintiffs herein are bound by the judgment in the Oklahoma case. The District Court accordingly

should have granted leave to the defendant to file the supplemental answer setting forth this defense. It should also have held that the plaintiffs were bound by the Oklahoma judgment.

This Honorable Court should rule that the evidence proves the plaintiffs participated in the Oklahoma action, and the case should be remanded to the District Court with instructions that said court permit the filing of the supplemental answer and second supplemental counterclaim and that it hold that the plaintiffs are bound by the Oklahoma judgment.

If this Court should feel for any reason that the defense of participation has not been established, certainly it must agree that the defense is a proper one. In that event the defendant should be permitted to make the supplemental pleading and to present further evidence at a trial.

This Court should not overlook the fact that the defendant need not establish any other defense if it can be shown that the plaintiffs are estopped by the Oklahoma judgment. If this Court is not ready now to rule in favor of the defendant, he is accordingly entitled to a trial.

BRIEF FOR CROSS-APPELLEE.

As stated in the Brief on Plaintiffs' Appellees' Cross-Appeal, the cross-appeal is concerned only with the restriction of the original injunction by the addition of a seventh paragraph reading:

"This judgment shall not be construed to mean that the defendant is enjoined from proceeding in the case of *LeRoy J. Leishman v. The Richards and Conover Company*, Civil Action No. 2155 of the United States District Court for the Western District of Oklahoma, and defendant is not enjoined from proceeding against *Galvin Manufacturing Company*."

In order to determine whether plaintiffs' cross-appeal has any merit, it is necessary to know why the seventh paragraph was added to the injunction in the first place.

The suit of *LeRoy J. Leishman v. The Richards and Conover Company*, Civil Action No. 2155 of the United States District Court for the Western District of Oklahoma, mentioned in the appended seventh paragraph to the injunction, was filed *before* the present suit was instituted [R. Vol. I, p. 4, par. 4]. Plaintiffs are thus wrong in saying at the bottom of page 76 that "Appellant's avowed purpose in that suit is to secure a decision which is in conflict with the judgment in this case." Not only was the Oklahoma suit filed *before* the present suit, but the *judgment therein* was rendered on June 10, 1946 [R. Vol. I, pp. 60-62], *before* the judgment was entered in the present case on September 12, 1946 [R. Vol. I, pp. 94-96]. Defendant's avowed purpose in the Oklahoma suit was to secure an independent adjudication of the issues of validity and infringement in a circuit other than the Ninth, in the hope of obtaining a decision in conflict with that of this Appellate Court in the *Asso-*

ciated case so that a controlling opinion might be obtained from the Supreme Court.

The present suit was instituted to *prevent* the defendant from obtaining an independent adjudication in another circuit. The plaintiffs knew that an independent adjudication, based upon full evidence as to the well-known equivalency of levers and plungers in this art before defendant's patent was granted, would bring out the fact that this Court's holding of non-infringement in the *Associated* case was incorrect; and they therefore tried to stop the Oklahoma suit and shift the controversy to the Ninth circuit where they hoped to obtain a rubber-stamped decision based upon this Court's opinion in the *Associated* case.

The plaintiffs failed to stop the Oklahoma trial, and the claims of Leishman's patent here at issue were consequently held "clearly valid and clearly infringed." The Richards and Conover Company, the nominal defendant in the Oklahoma action, has appealed from that judgment.¹²

As the injunction herein was originally drawn, it would have prevented Leishman from defending the Oklahoma appeal. It would also have prevented him from bringing an action to recover from The Galvin Manufacturing

¹²If the Tenth Circuit Court of Appeals affirms the Oklahoma judgment, the conflict between its opinion and that of this Court in the *Associated* case will constitute sufficient grounds for the Supreme Court to grant a petition by the Oklahoma defendant for a writ of certiorari. It should not be necessary, however, for the Supreme Court to resolve such a conflict. Now that the equivalency of levers and plungers for operating tuners and moving tappets has been shown by defendant and admitted by plaintiffs in the prior Kettell, Peck and Philips patents (pp. 17 and 18 hereof), this Court should render a decision forthwith to the effect that the plungers and levers are equivalents and that plaintiffs' tuners are

Company, manufacturer of the radio receivers sold by the nominal defendant in the Oklahoma case, which said receivers contained tuners made by the plaintiffs in the instant action. Mr. Mueller, who handled the defense at the Oklahoma trial, stated that he was retained for that purpose by the said Galvin Manufacturing Company, and the Oklahoma Court accordingly ruled in finding 3 [R. I, p. 53] that the "said Galvin Manufacturing Corporation is bound by the judgment herein."

The paragraph that was added to the injunction simply permits Leishman to defend on appeal the judgment which he won in Oklahoma, and to bring an appropriate action against the said Galvin Manufacturing Company.

The *Kessler v. Eldred* decision, cited by the plaintiffs, is not at all in point here. Four different suits were involved in that controversy. In the *first* suit, Eldred, who owned the Chambers patent, brought suit against Kessler, a manufacturer, for infringement of the Chambers patent. In that first suit, the Court held that Kessler, the manufacturer, did not infringe Eldred's patent. Eldred then filed a second suit, this time against a *different* manufacturer, alleging infringement by the same type of device that Kessler, the first manufacturer, was making. In this *second* suit, Eldred prevailed and the device

infringements. Such an action by this Court would eliminate any conflict between the circuits, save the time of the Supreme Court, and avoid unnecessary additional litigation.

Expeditious action by this Court can even make it impossible for the Oklahoma defendant to represent before the Tenth Circuit Court of Appeals that this Ninth Circuit Court of Appeals has an opinion contrary to what it now knows the facts to be. The record on appeal has not yet been printed in the Oklahoma case, and there is thus time to remove the Oklahoma appellant's present opportunity of urging this Court's opinion in the *Associated* case, rendered on an inadequate record, as a proper basis for comity.

was held to be an infringement. Armed with this decision in his favor, Eldred brought a *third* suit. This *third* suit was brought against Breitwieser, a customer of Kessler, the manufacturer against whom Eldred had directed his initial suit. Breitwieser, in this *third* suit, was charged with infringing Eldred's patent by selling the Kessler lighter, which in the *first* suit was declared not to be an infringement. Kessler, not Eldred, then filed the *fourth* suit, entitled *Kessler v. Eldred*, and it was this fourth suit that got up to the Supreme Court. With this background information, the plaintiffs' quotations from the Supreme Court decision in the case of *Kessler v. Eldred* will have more significance, especially if the different suits are parenthetically identified. In mentioning the question to be decided, the Supreme Court said:

"First. Did the decree in Kessler's favor, rendered by the circuit court for the district of Indiana in the suit of Eldred against Kessler (the *first* suit), have the effect of entitling Kessler to continue the business of manufacturing and selling throughout the United States the same lighter he had theretofore been manufacturing and selling, without molestation by Eldred, through the Chambers patent?

"Second. Did the decree (in the *first* suit) mentioned in the first question have the effect of making a suit by Eldred against any customer of Kessler's for alleged infringement of the Chambers patent by use or sale of Kessler's lighters a wrongful interference by Eldred with Kessler's business?" (206 U. S. at 286.) (Parenthetical explanations added.)

The Supreme Court answered both of these questions in the affirmative. It thus held that the *first* suit that determined the status of Kessler's tuners should *thereafter* be controlling. The reason the *Breitwieser* suit (the third

in the series) was out of order was because it had already been adjudicated in the first action that Kessler's tuners were *not* infringements. It was not the *last* suit that determined their status; the *last* suit said it was the *first* suit that did this. There was thus nothing retroactive about the decision.

In the instant case, the plaintiffs are trying to make the judgment between the manufacturers and the patentee in the California Court apply *retroactively* to The Richards and Conover Company and their privies. The status of the tuners in the Oklahoma case was determined three months before the judgment was entered in the present case.

If Leishman, who lost against Crosley in the *Associated* case, should now, having won in Oklahoma, file another suit against a Crosley jobber, his action would be the same as that of Eldred when he filed his suit against Breitwieser, the Kessler jobber. When Leishman sued The Richards and Conover Company, however, there had been no prior adjudication of the status of plaintiffs' tuners.

The injunction, as modified by the additional seventh paragraph, prohibits the defendant from filing suits against any customers of the plaintiffs who were not involved in the Oklahoma action; but he is not enjoined from protecting the judgment that he had already won against the Oklahoma defendant and its privies.

"Not only preliminary injunctions, but also final injunctions, are within the discretion of the court. This is true also in case of mandatory injunctions. The equities of the particular case must govern, and no injunction should be granted in any case which will necessarily operate contrary to the real justice of the case." *Cyclopedia of Federal Procedure*, Second

Edition, section 6552, pp. 94 and 95, published by Callaghan and Company, Chicago, 1944.

Had the judgment in the present case not been modified by the addition of the seventh paragraph, to which the plaintiffs object, the defendant would have been deprived of the patentee's recognized right to an independent adjudication of his rights in a second circuit—in fact, he would have been deprived of such independent adjudication after he had already obtained it.

“Before the establishment of the Circuit Courts of Appeals, an adverse decision as to the validity of a patent in one circuit appears not to have foreclosed litigation of the same issue in another, see *Barbed Wire Patent* 143 U. S. 275, 12 S. Ct. 443, 450, 36 L. Ed. 154; compare *United States v. American Bell Telephone Co.*, 128 U. S. 315, 372, 9 S. Ct. 90, 32 L. Ed. 450. *That it does not now is IMPLICITLY RECOGNIZED by the practice established under section 240(a) of the Judicial Code 28 U. S. C. A. § 347(a) and Rule 38 (5) of this Court (28 U. S. C. A. following section 354)*, that certiorari will not usually be granted in patent cases unless there is a conflict in the decisions of Circuit Courts of Appeals. We conclude that neither the rules of the common law applicable to successive litigations concerning the same subject-matter, nor the disclaimer statute, precludes relitigation of the validity of a patent claim previously held invalid in a suit against a different defendant.

“It follows that want of disclaimer of claims previously held invalid can never be set up as a bar *in limine* to the maintenance of a second suit upon those claims, and any others of the patent, since *the patentee is entitled to invoke in that suit the independent judgment of the court upon the validity of*

the claims which have been held invalid." (Emphasis added.)

Triplett et al. v. Lowell et al., 297 U. S. 638, 56 S. Ct. 645 at 648.

Had the injunction herein not been modified by the addition of the seventh paragraph, the patentee would have been deprived of an adjudication in the Tenth Circuit in conflict with the decision of this Ninth Circuit Court of Appeals in the *Associated* case. The District Court did not think that was proper. Furthermore, the District Court had no jurisdiction to issue an injunction that would in effect reverse the judgment of another District Court in another circuit. That would have been the effect of enjoining Leishman from defending the appeal from the Oklahoma decision.

The additional seventh paragraph of the injunction is manifestly proper and should stand.

Of course, if the summary judgment is set aside, or if the judgment of the lower Court is reversed, the injunction in its entirety will be wiped out; and defendant's briefs have demonstrated that this Court should take such action.

Conclusion.

The conclusion to Appellant's Opening Brief, pp. 78 to 80, summarized the various issues and recommended the individual rulings that would be consistent with the evidence, but it is respectfully submitted that this Court should act upon all the issues by holding:

1. That summary judgment should not have been granted against the defendant in direct conflict with the

judgment of another district court rendered after a full trial;

2. That summary judgment should not have been entered against the defendant on the basis of *stare decisis* in view of this Court's opinion in the case of *Leishman v. Associated Wholesale Electric Company*, because the record herein is vastly different.

3. That the summary judgment was improper for the additional reason that the defendant was entitled to every opportunity to establish the proper and legitimate defense that the plaintiffs are bound by the judgment in the Oklahoma action;

4. That the defendant's First Supplemental Answer and Second Supplemental Counterclaim should be entered;

5. That the plaintiffs are bound by the judgment of the United States District Court for the Western District of Oklahoma in the case of *LeRoy J. Leishman v. The Richards and Conover Company*, Civil Action 2155, because of their participation in the defense of that suit;

6. That irrespective of the fact that the plaintiffs are bound by the Oklahoma judgment, the claims here at issue are valid with respect to these plaintiffs because the said plaintiffs urge that this Court apply the holdings of its decision in the *Associated* case, which said decision restored the presumption of validity to the patent, the evidence against validity in the *Associated* case and the briefs attacking the patent having been insufficient to cause this Court to formulate an opinion that the claims were invalid;

7. That the Mackeown affidavit, filed on behalf of the plaintiffs, asserts that plaintiffs' tuners are the same as

the Crosley tuner involved in the *Associated* case in so far as the claims here at issue are concerned;

8. That the rocker and tappet of plaintiffs' tuners are therefore the same in so far as these claims are concerned as the rocker and tappet in the Crosley tuner, which were held in the *Associated* case to be equivalents of the corresponding elements of the patent;

9. That the objects of the original and reissue patents (in which the drawings and specification are identical) reveal that the patentee did not regard the operating member as being essentially a lever;

10. That claim 5, for the reason that it was a part of the original patent when it issued, must be taken into consideration when examining the original patent for the purpose of determining the patentee's original intent; and that the said claim 5, which did not call for the operating member as an element of the combination, clearly revealed that the patentee recognized his invention could be present irrespective of the nature of the operating means;

11. That with respect to the equivalency of plungers and levers, the record herein is vastly different from that in the *Associated* case;

12. That plaintiffs, even if they were not bound by the Oklahoma judgment, cannot avoid infringement of claims 9, 10 and 11 by using a plunger instead of a lever as the operating members called for therein, because it has been shown by the record now before this Court that these elements were well known in the art as proper substitutes in the operation of automatic tuners and for moving tappets when the patent at issue was granted;

13. That irrespective of the equivalency of levers and plungers, the plaintiffs infringe claims 7 and 8 for the

reason that these claims do not call for the operating member as an element of the combination; and

14. That since "that which is common and well known is as if it were written out in the patent and delineated in the drawings," both the original and reissue patents must be construed as if levers and plungers were shown therein as alternative means for moving the adjustable positioning elements, or tappets; and that the original and reissue patents are thus clearly for the same invention irrespective of the evidence to this effect contained in the objects and in original claim 5.

If, in the Court's view, it has not yet been conclusively established that controlling issues can only be resolved in defendant's favor, then a trial is essential; because if the defendant can establish only the single defense that the plaintiffs are bound by the Oklahoma judgment, all other issues are immaterial in so far as these plaintiffs are concerned, regardless of how such other issues might otherwise be decided.

If the issue of validity is to be tried, the lower court should be required to insist that the plaintiffs answer Defendant's Interrogatories 4, 5, 6, 7, 9, 10, 11, 17 and 18.

Respectfully submitted,

LEROY J. LEISHMAN,
Defendant, in Propria Persona.

